



### **THE EXAMINER HAS INTRODUCED A NEW GROUND FOR REJECTION**

As noted in at least MPEP 706.07(a), under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p).

In the Final Office Action mailed February 26, 2007, the Examiner introduced a new ground of rejection by rejecting claims 8-12 under 35 U.S.C. 101.

Applicants did not amend the claims in response to the previous non-Final Office Action dated July 12, 2006, nor was the Final Office Action mailed February 26, 2007 based on information submitted by the Applicants in an IDS.

Accordingly, because the Examiner has introduced a new ground for rejection that is neither necessitated by Applicants' amendment of the claims nor based on information submitted in an IDS, Applicants respectfully request withdrawal of the finality of the Office Action.

### **EXAMINER NOT RESPONDING TO PREVIOUS ARGUMENT**

As noted in at least MPEP 706.07, before a Final Action is proper, a clear issue should be reached between the Examiner and the applicant. As noted in at least MPEP 706.07(f), the Examiner is required to answer and address all traversals. This requirement is in addition to any repetition of a previously held position and is required to allow the applicant a chance to review the Examiner's position as to these arguments and to clarify the record for appeal.

Additionally and as further noted in MPEP 706.07(f), a failure of the Examiner to address the applicant's traversals can be deemed a failure to rebut these arguments so as to admit that the arguments have overcome the rejection. At the very least, the failure to address the applicant's traversals would render the Examiner's decision to again reject the claims arbitrary and capricious and invalid under the Administrative Procedures Act, 5 U.S.C. § 706, the standard under which such rejections are reviewed in view of *Dickinson v. Zurko*, 527 U.S. 150, 50 USPQ2d 1930 (1999).

Specifically, in the Final Office Action mailed February 26, 2007, the Examiner has failed to address at least Applicants' traversal regarding independent claim 17, presented in the response filed on October 12, 2006. Accordingly, Applicants request the Office withdraw the Final Office Action and issue a new non-Final Office Action addressing the arguments.

CONCLUSION:



As the outstanding Office Action has introduced a new ground for rejection and has failed to respond to Applicants' previous arguments, Applicants respectfully submit that the outstanding Office Action is improper and request withdrawal of the finality of the Office Action.

Accordingly, if there are any further formal matters remaining after this response, the Examiner is requested to telephone the undersigned to attend to these matters.

Respectfully submitted,

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